New York University Medical Center *and* Faustino Vargas, Leigh Benin, and Laszlo Berkovits. Cases 2-CA-16796, 2-CA-16824, and 2-CA-16833

May 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 31, 1980, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, New York University Medical Center, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Decision was corrected by an erratum issued by the Administrative Law Judge dated November 28, 1980.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage employees from distributing leaflets by unlawfully issuing disciplinary warnings to or suspending or discharging employees for engaging in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the disciplinary warnings issued to Faustino Vargas and Leigh Benin on September 28, 1979, and to Laszlo Berkovits on October 11, 1979, and WE WILL expunge any references to these warnings from their personnel files.

WE WILL reimburse Faustino Vargas and Leigh Benin for the pay they lost during their periods of suspension, with interest.

WE WILL offer Leigh Benin immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his discharge, with interest.

NEW YORK UNIVERSITY MEDICAL CENTER

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard at New York, New York, on July 14 and 15, 1980. Charges were filed in October 1979 and a consolidated complaint was issued on April 16, 1980, alleging that New York University Medical Center (herein Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine wit-

nesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel, Respondent, and Leigh Benin.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an administrative division of New York University, a private, nonprofit institution of higher education located in New York, New York. Respondent is engaged in providing health care and related services at its medical facility located in New York City. During the 12 months preceding the issuance of the complaint, Respondent's gross revenue was in excess of $1 million and it purchased and received at its New York City facility goods and supplies valued in excess of $50,000 directly from points outside the State of New York. Respondent admits, and I so find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (herein District 1199), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by issuing disciplinary warnings to Faustino Vargas, Leigh Benin, and Laszlow Berkovits, by suspending Benin and Vargas and by discharging Benin. Respondent denied the allegations claiming that Benin, Vargas, and Berkovits were issued disciplinary warnings for distributing leaflets which were unprotected under the Act, that Benin was suspended for additional unprotected leafleting, and that Benin was discharged and Vargas was suspended because they picketed the private residence of one of Respondent's employees. The issues thus are: (1) was the distribution of the leaflets protected activity under the Act; (2) were Benin's discharge and Vargas' suspension motivated by protected activity; and (3) should the Board defer to the award of an arbitrator and dismiss the complaint.

B. *The Facts*

Benin, Vargas, and Berkovits worked as technicians at Respondent's facility. Benin and Vargas were District 1199 delegates and all three were members of the Committee Against Racism (CAR), a national organization.

During September 1979 elections were held for delegates to the biannual national convention of the National Union of Hospital and Health Care Employees (NUHHCE). The purpose of the convention was to set policy and to elect the officers of the national union. District 1199 was entitled to send approximately 40 delegates to the convention.

Members of District 1199 who also belonged to CAR or the Progressive Labor Party decided to designate a slate of candidates to run as delegates to this convention. Benin, Vargas, and 10 others qualified as candidates and were designated as "Slate 2" by District 1199's election board. This group ran against "Slate 1," which included the incumbent officers of District 1199. The balloting for convention delegates took place on September 18 and 25.[1] The returns from the balloting of September 18 showed that Slate 2 had received 60 percent of the vote.

On September 21, 24, and 25 Benin distributed two leaflets (G.C. Exhs. 4 and 5). He was joined in the distribution by Vargas on September 24. General Counsel's Exhibit 4 states, in pertinent part:

> Vote Slate 2, the Anti-Racist Slate. We urge 1199 Hospital Div. Workers to VOTE SLATE 2 on Tuesday, September 25th. . . . Join the Committee Against Racism.

General Counsel's Exhibit 5 states, in pertinent part:

> Join the Committee Against Racism. Vote Slate 2, The Anti-Racist Slate. . . . [T]he NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them.

On September 28, Respondent advised Benin and Vargas in writing that their activities in distributing General Counsel's Exhibit 5 "constitutes grounds for disciplinary action." The memorandum further stated that "any repetition of this or similar misconduct will result in appropriate disciplinary action, including suspension or discharge."

During the period October 5 through October 9, Benin, Vargas, and Berkovits were involved in the preparation and distribution of another leaflet, General Counsel's Exhibit 8. This leaflet discussed the outcome of the September 18 election and also stated that Benin and Vargas received written warnings for distributing General Counsel's Exhibit 5. In addition, among other accusations, the leaflet stated, "we reaffirm our charge that the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers." On October 5, because of his participation in the distribution of General Counsel's Exhibit 8, Benin was suspended from work without pay.

On October 8, Benin, Vargas, and several others picketed in front of the personal residence of Keith Safian, an assistant administrator of Respondent. Benin carried a sign which stated that Safian was guilty of unfair labor practices and Vargas carried General Counsel's Exhibit 13, which announced a CAR rally to be held at Harper's Ferry on October 27. Benin and Vargas both testified that at no time were they on Safian's property.[2]

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[1] Unless otherwise specified dates refer to 1979.

[2] Their testimony was not contradicted. Accordingly, I credit their testimony and find that during the picketing Benin and Vargas were not on Safian's property.

On October 11 Respondent discharged Benin and suspended Vargas. On the same day Respondent sent a written warning to Berkovits for distributing General Counsel's Exhibit 8.

1. Distribution of Leaflets

Respondent contends that, because of the language contained in the leaflets, their distribution is not activity protected by the Act. For the reasons stated below, I believe that the language is not such as to lose protection under the Act. Accordingly, any disciplinary action taken by Respondent because of the distribution of these leaflets violates Section 8(a) (1) of the Act.

Employee literature, otherwise protected, loses this status only in limited circumstances, such as if the literature contains attacks on an employer's products or services (*N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers [Jefferson Standard Broadcasting Company]*, 346 U.S. 464 (1953)); material so disruptive as to threaten plant discipline (*Southwestern Bell Telephone Company*, 200 NLRB 667 (1972)); and malicious falsehoods (*Great Lakes Steel, Division of National Steel Corporation*, 236 NLRB 1033 (1978)).

The leaflets do not attack or disparage the services that Respondent delivers, *viz*, health care services. In addition, the leaflets do not urge or incite, through obscenities or otherwise, employees to take any action which would be disruptive of Respondent's right to enjoy an orderly workplace.

Respondent contends that the leaflets contain statements which constitute "malicious falsehoods," such as "the NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them" (G.C. Exh. 5) and "we reaffirm our charge that the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers" (G.C. Exh. 8). The question to be answered is whether the leaflets contain statements which Benin, Vargas, and Berkovits knew were false or were published with reckless disregard for the truth. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964); *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966).[3]

Benin and Vargas testified that they received reports that Respondent's guards were searching black and Hispanic employees. These reports served as the basis for the statements in the leaflets concerning the practices of Respondent's security guards. Indeed, Benin and Vargas gave the names of employees who made these reports.

I am not required to determine whether, in fact, illegal searches were carried out. Instead, I must determine whether the distributors of the leaflets knew that the statements were false or published them with reckless disregard for whether they were false or not. As outlined above, based on the record, I find that Benin, Vargas, and Berkovits did not know that the statements were false nor were they published with reckless disregard for whether the statements were false or not. While I do not condone the use of terms such as "fascist gestapo" in the present circumstances, the Supreme Court has stated "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn* v. *United Plant Guard Workers of America, Local 114, supra*, 383 U.S. at 63.[4]

Accordingly, I find that the distribution of the leaflets was an activity protected by the Act and therefore the disciplinary warnings to Vargas, Benin, and Berkovits and the suspension of Benin were violations of Section 8(a)(1) of the Act

2. Discharge of Benin and suspension of Vargas

Respondent contends that Benin was discharged and Vargas was suspended because they picketed the personal residence of Keith Safian, an assistant administrator of Respondent. Respondent further argues that such picketing is unprotected. It is unnecessary for me to reach the question of whether such picketing is protected[5] for I find that the distribution of the leaflets was a motivating factor in Benin's discharge and Vargas' suspension.

The Board has recently restated the test to be applied in so-called mixed motive cases. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). The Board requires that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a *motivating factor* in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "the same action would have taken place even in the absence of the protected conduct."

I find that the General Counsel has made a *prima facie* showing that the leafleting was a motivating factor in Benin's discharge and Vargas' suspension. Thus, the telegram discharging Benin states, in pertinent part, "your recent activity in distributing leaflets containing inflammatory and baseless charges which incited employees against the Medical Center and fellow employees and disparaged the good name and reputation of the Medical Center, was also considered in reaching the decision to discharge you." Similarly, the memorandum to Vargas dated October 11, 1979, suspending him, stated in pertinent part, "your recent activity in distributing leaflets containing inflammatory and baseless charges which incited employees and disparaged the good name and reputation of the Medical Center was also considered in reaching the decision to suspend you."

The conclusion that the distribution of the leaflets was a motivating factor in the subsequent discharge of Benin and the suspension of Vargas is corroborated by testimony at a state unemployment compensation hearing in which Safian stated:

> Mr. Benin, on the other hand, received a warning, was observed again handing out objectionable

[3] In *Linn* the Supreme Court explicitly adopted the *New York Times* standards in NLRB proceedings. *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974).

[4] Indeed, some of the very language used in the leaflets has been held to be protected. Thus, the use of the term "fascist" was protected in *Cafeteria Employees Union, Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943), and the use of the term "racist" was permitted in *Owners Maintenance Corp.*, 232 NLRB 100, 102 (1977), enfd. 581 F.2d 44 (2d Cir. 1978).

[5] I have previously found that Benin and Vargas were not on Safian's property during the picketing.

> material, then got a five day suspension, and then, because of picketing subsequent to that, after having the progressive disciplinary steps of warning and suspension, we felt that he should be terminated.

Respondent has not demonstrated that Benin would have been discharged and Vargas suspended were only the picketing involved. On the contrary, Safian's above-quoted testimony indicates that Respondent believed that the three steps of warning, suspension, and termination had to follow in proper sequence to justify disciplinary action. Indeed, Vargas was not discharged for the picketing but was merely suspended, presumably because prior to the picketing he had been subject to only the first step of the disciplinary process.

Accordingly, I find that the distribution of the leaflets was a motivating factor in Benin's discharge and Vargas' suspension. Such discharge and suspension violated Section 8(a)(1) of the Act.

3. Arbitration award

Respondent has moved that I defer to the award of arbitrator Herbert L. Marx, Jr., dated May 20, 1980. For the reasons outlined below, I deny the motion to defer.

The arbitrator determined that the warning letter, suspension, and discharge of Benin were all for just cause. There was no award with respect to Vargas and Berkovits.

In discussing the leaflets the arbitrator refers specifically to the statement "the NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them." The arbitrator determined that Respondent was in its rights to discipline Benin because of such statement, declaring "there is no need for the Medical Center to stand by defenseless in the face of such scurrilous accusations." Similarly, with respect to Benin's suspension, the arbitrator found that Respondent was justified in suspending Benin because of language in the leaflets such as "fascist gestapo." Concerning Benin's discharge, it appears that the arbitrator recognized that the leafleting and picketing were interrelated. Thus, the arbitrator stated that "the Medical Center had sufficient cause to warn, suspend and discharge Leigh Benin for his share of responsibility in the events described."

As stated earlier, I have found the very language referred to by the arbitrator to be protected under the Act. Inasmuch as the arbitrator found such language to be unprotected, his decision is clearly repugnant to the purposes and policies of the Act. See *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082 (1955); *Owners Maintenance Corp., supra*. In addition, neither Vargas nor Berkovits agreed to be bound by the results of the arbitration. Accordingly, deferral with respect to them is inappropriate. See *Spielberg Manufacturing Co., supra.*

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing warning letters and suspending and discharging employees for activities protected by the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily suspended Faustino Vargas and Leigh Benin, I find it necessary to order that Respondent make them whole for the periods of their suspension.

Respondent having discharged Leigh Benin in violation of the Act, I find it necessary to order Respondent to offer him full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any losses of earnings that he may have suffered from the time of his termination to the date of Respondent's offer of reinstatement.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, New York University Medical Center, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from distributing leaflets by unlawfully issuing disciplinary warnings and by suspending or discharging employees for activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721 (1962)

[7] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer Leigh Benin immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any losses of earnings in the manner set forth in the section above entitled "The Remedy."

(b) Reimburse Faustino Vargas and Leigh Benin for the pay they lost during their periods of suspension, and make them whole for any loss of earnings in the manner set forth herein in "The Remedy."

(c) Rescind the disciplinary warnings issued to Faustino Vargas, Leigh Benin, and Laszlo Berkovits referred to in this Decision, and expunge any reference to these warnings from their personnel files.

(d) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."